



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

Thomas S. Burack, Commissioner



April 13, 2016

Mr. H. Curtis Spalding
Regional Administrator
U.S. Environmental Protection Agency, Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Re: Withdrawal of Affirmative Defense Provisions in NH Rules Env-A 1900, 2100, 2400

Dear Administrator Spalding:

As Governor Hassan's designee, I hereby withdraw the affirmative defense definition and provisions contained in New Hampshire's rules which were submitted for and approved into the State Implementation Plan (SIP).

On July 23, 2013, the New Hampshire Department of Environmental Services (NHDES) submitted for inclusion in the SIP the following administrative rules:

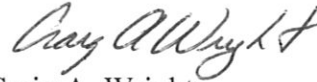
- Env-A 1900, *Incinerators*;
- Env-A 2100, *Particulate Matter and Visible Emissions Standards*; and
- Env-A 2400, *Ferrous and Non-Ferrous Foundries, Smelters, and Investment Casting Operations*.

While these three rules are important to the state's plan to maintain NAAQS, the "affirmative defense" provisions included therein are the subject of a recent Restatement and Update of EPA's Startup, Shutdown and Malfunction (SSM) Policy Applicable to SIPs¹ in which the EPA states "where a state's existing SIP includes an affirmative defense provision that would purport to alter the jurisdiction of the federal courts to assess monetary penalties for violations of CAA requirements, then the EPA is determining that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA." Although the State is not subject to a SIP call, the rules submitted in July 2013 are not approvable because they contain affirmative defense provisions. NHDES is requesting that the following sections be removed from the rules: **Env-A 1902.02**, **Env-A 2103.03** and **Part Env-A 2405**. These provisions will be removed from the administrative rules or rewritten in accordance with the EPA's SSM Policy via the State's rulemaking process. It is noted however that the affirmative defense instructions at Env-A 2103.03 state "This section shall not be construed as limiting the authority of EPA or citizens under the Act," thus maintaining EPA's enforcement authority and citizen suit provisions to act in the event of excess emissions during a malfunction.

¹ [Federal Register | State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Period](#)

If you have any questions, please contact me at (603) 271-6791 or Michele Roberge of my staff at (603) 271-6793.

Sincerely,

A handwritten signature in cursive script, appearing to read "Craig A. Wright".

Craig A. Wright
Director
Air Resources Division

cc: Anne Arnold, EPA Region I
Alison Simcox, EPA Region I